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Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region II
290 Broadway, 17th Floor
New York, NY 10007-1866

Re: LCP Chemical Site, Linden, New Jersey

Dear Muthu:

As you have informed me, the U.S. Environmental Protection Agency (EPA) considers Praxair, Inc. (Praxair) a potentially responsible party under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as a former operator at the LCP Chemical Site (Site), a NPL site, and the EPA intends to issue a unilateral administrative order to Praxair requiring it to perform a Remedial Investigation and Feasibility Study. We understand that EPA's position arises from Union Carbide Corporation's (UCC) operation of a hydrogen facility on a 2.1 acre former leasehold (Leasehold) at the Site for over thirty years. See Attachment 1. Praxair, Inc. has assumed the obligations, if any, of UCC at this Site and, as well, as a successor to Liquid Carbonic Carbon Dioxide Corporation (LCCD), has assumed the liabilities of LCCD, if any, for its carbon dioxide distribution terminal activities on a part of this Leasehold for approximately six years beginning in 1988. LCCD parked 6-7 trucks at its terminal area and stored carbon dioxide, not a hazardous substance under CERCLA, at its terminal. As Praxair's June 12, 1998 letter in response to EPA's information request states, Praxair has no information nor, to our knowledge does EPA have any information, regarding the

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release of any hazardous substances by LCCD at, under, or around the leased terminal area or at the Site.

This letter is intended to persuade the EPA not to issue an administrative order to Praxair because UCC's, Praxair's, and LCCD's activities on the small, discrete Leasehold at the 26 acre Site: (1) did not contribute to the Site's hazardous substances requiring any response actions under CERCLA; and (2) even if any CERCLA response actions may be legally required by the EPA to be undertaken at the Leasehold by Praxair, such actions are limited by CERCLA and relevant case law to only the former Leasehold.

I. Summary of the Facts Regarding Activities at the LCP Chemical Site

A. Union Carbide Corporation Hydrogen Plant Operations

As Praxair has stated in its May 5, 1998 response to EPA's section 104(e) request, UCC, beginning in 1957, operated a hydrogen transfill and repackaging plant on the Leasehold. LCP Chemicals & Plastics, Inc. (LCP) was the lessor for virtually the entire duration of the various leases. In 1988, UCC transferred ownership of its hydrogen plant to Linde Gases of the Mid-Atlantic, Inc., a subsidiary of Union Carbide Industrial Gases Inc., now known as Praxair, Inc. Union Carbide Industrial Gases Inc. was a wholly owned subsidiary of UCC and was spun-off, as Praxair, Inc., from UCC as a separate corporation, unaffiliated with UCC. Operations at the hydrogen plant ceased in May 1990.

B. UCC Cleanup of Hydrogen Plant Facility - Decontamination Project

In the late 1980's, in anticipation that the hydrogen plant operations might be relocated, UCC began planning the investigation and remediation of the hydrogen plant

buildings and equipment. Remediation of the hydrogen plant facilities was needed to address mercury contamination caused by LCP's chlorine production operations. During the hydrogen plant operations, LCP transferred to UCC, via pipeline, unpurified hydrogen gas. The hydrogen gas was tainted with mercury because of LCP's chlor-alkali production operations. UCC purified the hydrogen prior to containerizing the hydrogen gas for sale. Over many years, however, the process of hydrogen gas purification contaminated UCC's leasehold buildings and some equipment with mercury. This hydrogen gas transfer and mercury removal process terminated in 1980, yet the residual mercury needed to be removed from UCC's buildings and equipment.

In 1987 UCC estimated that a staged cleanup could be accomplished by 1990. The eventual cleanup cost was over \$600,000. This extraordinary cost represents, inter alia, the work needed to decontaminate mercury from the walls, floors, ceilings, and roofs of buildings which were dismantled and removed from the Leasehold. Waste materials from this activity were disposed of, in accordance with law, at SCA Chemical Services, Inc. at Model City, NY. Mercury collected from this cleanup was transported and manifested to Bethlehem Apparatus in Hellertown, PA. In 1987 UCC excavated soil contaminated with used oil and mercury and manifested the waste to Envirosafe Services of Ohio in Oregon, OH. The New Jersey Department of Environmental Protection approved the excavation and cleanup. Attachment 2 is an April 22, 1988 letter from International Technology Corporation, UCC's environmental consultant, detailing the cleaning, and mercury removal, from an air compressor at the Leasehold.

C. UCC Cleanup of the Leasehold under the New Jersey Environmental Cleanup Responsibility Act and the Industrial Site Recovery Act

In May 1990 Linde Gases of the Mid-Atlantic (Linde) submitted a Site Evaluation Submission (SES) under New Jersey's Environmental Cleanup Responsibility Act

(ECRA) to the New Jersey Department of Environmental Protection & Energy (NJDEPE). The SES was submitted in accordance with State law since Linde was terminating its lease with LCP. In the next four (4) years Linde (Praxair, as of July 1992) with the assistance of the International Technology Corporation, undertook extensive soil, subsoil, and groundwater investigations, soil excavation, and other remediation to satisfy ECRA requirements.

Specifically, soil sampling and analysis was completed in June 1990 and June 1991. Additionally, remedial excavations and soil sampling and analysis were completed in April 1992. Groundwater sampling and analysis were performed in June 1991, July 1991, and April 1992. The results of the soil and groundwater sampling and analysis, prior to July 1991, were provided to the NJDEPE in two separate *Remedial Investigation Reports* in March 1991 and July 1991. The results of the July 1991 and April 1992 groundwater sampling and analysis and the April 1992 remedial excavations were provided to the NJDEPE in the May 1992 *Remedial Investigation Report*.

On November 24, 1992, Praxair met with the NJDEPE to discuss future remediation, if any. The parties agreed that capping of the unpaved areas of the Leasehold would provide a cost-effective and environmentally sound remedial option, in accordance with state law, for this case. In February 1993, Praxair submitted the ECRA Cleanup Plan based upon the conclusions reached with the NJDEPE during the November 1992 NJDEPE meeting. The draft NJDEPE Cleanup Plan approval letter was received by Praxair in September 1993 and responded to with comments in October 1993. Following the NJDEPE Cleanup Plan/Remedial Action Workplan approval in April 1994, the remedial capping and related activities were implemented in April 1994. Praxair's Remedial Action Report was filed in June 1994 (Attachment 3).

The NJDEPE provided its final approval letter to Praxair, signifying achievement by Praxair of the state of New Jersey's legally applicable and relevant and appropriate requirements, on June 20, 1995 (see Attachment 4) and a Declaration of Environmental Restrictions was made as of September 23, 1994 (Attachment 5). Attachment 6 is a September 28, 1994 letter from International Technology Corporation to Praxair providing a cost estimate for remediation of the Leasehold to NJDEPE residential cleanup criteria. The cost was \$1,480,005, over 80% of which was based on excavation of the contaminated fill material provided by GAF prior to UCC's Leasehold. Since the historic contaminated fill was not provided by UCC, the NJDEPE did not require that Praxair excavate it. Because the Leasehold was also surrounded by hundreds of acres of contaminated industrial property, NJDEPE, correctly, did not apply its residential cleanup criteria. Instead, the NJDEPE applied the attached Soil Cleanup Criteria (Attachment 7) which were achieved by Praxair.

Extensive documentation of Linde's and Praxair's cleanup activities were provided to the EPA as attachments to Praxair's May 5, 1998 response to EPA's information request under CERCLA.

D. CERCLA History of the LCP Chemicals, Inc. Superfund Site

1. EPA's Site Assessments Identify No Hazardous Substances from UCC, Praxair, or LCCD.

As a result of a verbal request in January 1996 from the Pre-remedial Section of the Surveillance and Monitoring Branch, EPA, Region II, the Removal Action Branch (RAB) engaged in a Removal Site Evaluation of the LCP property. As the August 12, 1996 "Removal Site Evaluation for LCP Chemicals, Inc." from Mr. Nick Magriples, On-Scene Coordinator for the RAB, states on page 1, "the request was

focused on the former lagoon area.” The former lagoon area was never a part of the Leasehold and is found approximately six hundred feet, “as the crow flies”, east and north of the nearest edge of the former Leasehold. At least five sets of railroad tracks, several buildings, and a few roads separate the lagoon from the Leasehold. We have found no documents in the EPA’s administrative records of the Site, nor are we aware of any documents, indicating that there (1) was or is any physical nexus between the lagoon and the Leasehold; or (2) were any transshipments of any hazardous substances or any waste materials from the Leasehold to the lagoon or any other portion of the Site. The lagoon area was used by General Aniline and Film Corporation (GAF) and LCP for many years for the disposal of various hazardous substances.

The Removal Action Branch’s activities, understandably, centered on the lagoon, or impoundment, and neighboring buildings and facilities used by GAF and LCP. Apparently, neither the Removal Action Branch nor the EPA pre-remedial contractor (1995) nor any other EPA representative, ever sampled the former Leasehold or concluded that any contamination existed at or emanated from the Leasehold that required response actions under CERCLA. Moreover, Figure 2 to that Evaluation identifies *only* the “Chem-Fix Test Lagoon” and “Brine Sludge Lagoon” and adjacent facilities. The Leasehold is hundreds of feet away and not even in the diagram.

Mr. Magriples concluded in his August 1996 memorandum that the LCP Chemicals, Inc. property was not eligible for a CERCLA Removal Action. He concluded by stating that “there are no completed or anticipated human exposure pathways associated with the Site under present conditions.” In 1998 EPA conducted another on-site investigation and confirmed its prior conclusion that conditions at the site did not require a removal action under CERCLA.

In February 1997 EPA issued its final Hazard Ranking System Evaluation for the LCP Chemicals, Inc. site. The evaluation concluded that there were no exposure pathways of contaminants from the Site for groundwater, soil or air. ***The sole basis for listing the Site was the potential exposure to people and the environment via a surface water pathway from the lagoon and nearby areas to South Branch Creek.*** Neither UCC nor LCCD ever discharged any wastewater, other liquids, or any other substances or materials to the South Branch Creek and we have found no documents in the EPA administrative record for this Site indicating any known or suspected nexus to the lagoon or South Branch Creek or any surface water from the former Leasehold during the tenancy of UCC or LCCD.

2. EPA's Site Assessment Identifies LCP, GAF as Sources of Hazardous Substances

The following is a very brief summary of what EPA concluded about the hazardous substances, and their sources, at the LCP Site. The Site, which occupies 26 acres on filled marshland in an industrial area, is bordered by South Branch Creek to the east, GAF Corporation to the north, and Northville Industries, BP Corporation, and Mobil to the northeast, south, and west, respectively. South Branch Creek, a tributary to the Arthur Kill, flows through a portion of the Site via engineered conveyance structures on the north side of the property. GAF purchased the land from the U.S. Government in 1950, filled an area of marshland and lowland, and developed it. GAF produced chlorine (using mercury cell electrolysis) and sodium hydroxide at this location from 1952 to 1972. LCP Chemicals Inc. (a subsidiary of the Hanlin Group, Inc.) of Edison, New Jersey purchased the property from GAF in 1972 and continued to produce chlorine until 1985, when production at the plant ceased permanently. Sludge containing mercury from the chlorine production process was discharged to a brine sludge lagoon (the lagoon referred to above) located on the property.

In 1981, the New Jersey Department of Environmental Protection ("NJDEP") entered into an Administrative Consent Order with LCP Chemicals, Inc. This Consent Order called for the closure of the brine sludge lagoon and implementation of air, soil, and groundwater monitoring. Analytical results from soil samples collected in 1982 by LCP Chemicals, Inc., revealed elevated levels of mercury at 0-2 feet in depth, with concentrations ranging from 36 milligrams per kilogram (mg/kg) to 772 mg/kg. Surface soil samples collected from the perimeter of the lagoon at that time indicated mercury levels ranging from 27 mg/kg to 1,580 mg/kg. These results are summarized in a February 1982 report, prepared by Geraghty & Miller, Inc. for LCP Chemicals, Inc., entitled *Waste Lagoon Ground-Water Monitoring*. In January 1995, EPA collected several surface soil, surface water, and sediment samples during a pre-remedial investigation, *none of which came from the Leasehold*. The average concentration of mercury in the sediments downstream of South Branch Creek, which flows east, away from the Leasehold, was 500 mg/kg, with the highest concentration being 1,060 mg/kg. Mercury was detected in the surface water at 93 micrograms per liter near the facility's outfall. Arsenic was also present in most of the samples. Arsenic concentration in the surface water and sediment were 336 mg/l and 318 mg/kg, respectively. Zinc (maximum concentration, 833 mg/kg) and lead (maximum concentration, 304 mg/kg) were also noted in these samples. These results are summarized in a June 1995 report entitled *Final Draft Site Inspection, LCP Chemicals, Inc.*, prepared by Malcolm Pirnie, Inc. for the EPA.

Leaching of contaminants into South Branch Creek is ongoing. The flow of contaminants into the Arthur Kill has not been defined as of yet. There is a potential for acute effects to aquatic biota for the length of South Branch Creek, and contamination could be introduced into the food chain via aquatic species present in the creek.

On July 27, 1998, the Site was placed on the National Priorities List ("NPL").

Through the years, there have been several documented significant releases at the Site. Overflows of supernatant material from the brine sludge lagoon to the South Branch Creek were observed by the NJDEP in 1972 and 1974. In 1975, a brine recycle pump failed and a breach in the brine sludge lagoon occurred. In 1979, a sodium chloride solution contaminated with inorganic mercury overflowed from the process and the wastewater system, resulting in a release of an estimated 10,000 to 20,000 gallons of this material into South Branch Creek. Releases from piping near a 500,000 gallon tank located on the property were observed in 1980, 1981, and 1982. The volume and nature of the released liquid are unknown.

None of the above facts and conclusions, all stated by the EPA in its draft Administrative Order on Consent for Remedial Investigation and Feasibility Study, relate to any activities or operations that occurred on the Leasehold or were undertaken by UCC, Linde, Praxair, or LCCD. Rather, the facts and conclusions relate solely to operations of the past owners of the Site and operators of the chlorine manufacturing operations.

In addition, during Hanlin Group, Inc.'s ownership of the Site, which began in 1972 according to its June 3, 1998 response to EPA's information request, Hanlin operated the mercury cell process for about ten (10) years and filled the lagoon "with mercury-contaminated hazardous waste generated from the chlor-alkali operations. The lagoon ...contained about 30,000 cubic yards of waste, and covered 1.5 acres. The disposal of brine muds was terminated in March 1982. The plant's waste lines were flushed to the lagoon..." The contents of an adjacent lagoon, containing wastes treated by experimental chemical fixation, were transferred to the brine sludge lagoon.

GAF purchased the land in 1950, filled the marshland with metals-contaminated soil, and developed it. From 1964 to 1972, GAF produced chlorine (using mercury cell electrolysis) and sodium hydroxide in buildings and facilities adjacent to South Branch Creek and across the street from the two lagoons.

For over one hundred years GAF has operated other facilities on a 125 acre parcel immediately north and northeast of the Site, its property boundary being less than 100 feet from the South Branch Creek located at the LCP Site. GAF was responsible for filling the marshland on this extensive parcel, as well as virtually the entire LCP Site, with fill material which contained heavy metals, including arsenic. Praxair identified GAF as the source of this material in a September 30, 1992 letter to Mr. Joseph Goliszewski of the New Jersey Department of Environmental Protection and Energy. See Attachment 8 and its attachments. Praxair had obtained the documentation supporting these conclusions from NJDEPE'S own files. ISP Environmental Services Inc., by its admission, is the successor to GAF Corporation with respect to the LCP Chemical Site.

Neither UCC, Linde, Praxair, nor LCCD was in any way responsible for the fill, which also contained slag, crushed stone, and brick, used by GAF prior to UCC's and LCCD's leases on the Site. There is no documentation in EPA's administrative record of the Site or in the NJDEPE's records demonstrating that UCC, Linde, Praxair, or LCCD was in any way responsible for this historical fill containing heavy metals -- the same heavy metals identified by EPA in its Site-related investigations. The arsenic found in Geraghty & Miller's RCRA Facility Assessment performed for LCP in 1992 may, for example, have been derived from this fill material.

II. Why EPA Should Not Issue a CERCLA Administrative Order to Praxair

A. EPA's Policy on Issuance of CERCLA §106 Orders

On January 31, 1990 EPA issued its "Guidance on CERCLA §106(a) Unilateral Administrative Orders for Remedial Design and Remedial Action" (Guidance). The Guidance superseded EPA's September 8, 1983 "Guidance Memorandum on Use and Issuance of Administrative Orders Under §106(a) of CERCLA". As the new title suggests, the Guidance evidences a narrowing of preferences for the use of unilateral administrative orders in the remedial process -- to compel the conduct of remedial designs or remedial actions, but impliedly not remedial investigation or feasibility studies. EPA directly confirms this preference by stating, on p. 6, n. 11, "Agency policy favors use of consent orders for RI/FSs" and refers the reader to OSWER Directive number 9835.19 ("Administrative Order on Consent for Remedial Investigation/Feasibility Study").

In paragraph II of the Guidance, the EPA states that the objective of Superfund enforcement is to "place ultimate responsibility for the costs of cleaning up Superfund sites on those who contributed to the problem". At the LCP Chemical Superfund Site, the only "problem" identified by the EPA's administrative record was created by companies other than UCC, Linde, Praxair, or LCCD.

The Guidance also provides that "before the order may be issued, the affected state must be notified." While we do not know whether the NJDEPE was advised of the EPA's intent to issue Praxair a unilateral administrative order, we believe that consultation with the NJDEPE would provide additional information to the EPA supporting Praxair's position that no order - or other enforcement action - should be taken

against Praxair. The NJDEPE intensively oversaw and approved Praxair's cleanup at the Site and can offer additional first-hand knowledge of the investigation and remediation undertaken at the Leasehold. The cleanup satisfied environmental laws of the state of New Jersey and should satisfy CERCLA's requirements. The EPA has not provided Praxair with any "legally applicable or relevant and appropriate" requirements under CERCLA that have not already been met by Praxair's remediation at the Leasehold. While the EPA has maintained that Praxair, as an "operator" under Section 107(a) of CERCLA, is jointly and severally liable for response actions at the Site, we submit that such an interpretation of "operator" status is unwarranted under the facts of this matter and that, even if Praxair were an "operator", relevant case law regarding divisibility of harm restricts Praxair's liability, if any, to the Leasehold.

Given the facts in Section I, and EPA's policy disfavoring issuance of unilateral administrative orders for performance of Remedial Investigations and Feasibility Studies, the EPA should not issue Praxair an order but await receipt of data, if any, attributing any future response actions, to UCC's or Praxair's operations.

B. The Former UCC/UCIG Hydrogen Plant Activities Do Not Give Rise to Operator Liability Under CERCLA

1. "Facility"

We have been unable to determine from the EPA administrative record why the EPA decided to define the "facility" or "Site" as the entire 26 acres owned by LCP. The effect of this convenient designation, of course, is to sweep within the coverage of CERCLA all operations at this Site, regardless of the discreteness of the activities, business ownership, or the absence of any harm attributed to such businesses. Recently, the United States Court of Appeals for the Sixth Circuit addressed the

designation of a "facility" under CERCLA. In *U.S. v. Township of Brighton*, 153 F.3d 307 (6th Circ. 1998), the Court considered the claims of the Township that it was responsible for only wastes in a three-acre corner of a larger landfill (the "facility") and that it should not be considered a section 107(a) "operator" of the much larger landfill, or CERCLA "facility". While the Court rejected the Township's claims that the three acres on which it disposed of wastes was not part of the "facility", the reasoning of Judge Moore, concurring, is noteworthy. Only because the landfill in question "operated as a single landfill", was it considered a "facility". Because the District Court record contained evidence of transshipment of waste from the three acre portion to the other portions of the "facility", and the landfill had no discrete boundaries within it, the entire landfill was held to be the "facility". The clear implication of this decision is that a discrete area of a "facility" could be "carved out" from the "facility's" jurisdiction and, therefore, not be subject to CERCLA coverage at all. Judge Dowd, dissenting, explicitly recognized this. He found that there were insufficient facts on which to hold that the property was not naturally divided into separate corners and concluded that the "facility" should not have included the Township's dumping area.

At LCP, there are no "insufficient facts" regarding segregation of activities. The Leasehold, by operation of law, was separate from the chlor-alkali operations and related operations at GAF and LCP which triggered NPL listing of the Site. There are no allegations of transshipment from the Leasehold to the rest of the Site. No facts exist, or are even suggested, that operations at the Leasehold contributed to listing of the Leasehold portion of the Site on the National Priorities List. Moreover, the contamination arising from Leasehold operations were remediated in accordance with New Jersey state law and the entire Leasehold capped and paved.

2. Divisibility of Harm

The law in the Third Circuit of the federal courts is settled on the issue of whether divisibility of harm can trump the government's claim of joint and several liability under CERCLA. It can. In *U.S. v. Alcan Aluminum Corp.*, 964 F. 3d 252 (3rd Circ. 1992), the court held that the common law principles of joint and several liability provide a necessary balance between a PRP's and the government's conflicting interests and inject fairness into the CERCLA statutory scheme. Relying on the Restatement (Second) of Torts, Section 433A, the court found that damages among joint tortfeasors causing distinct harms or a single harm should be apportioned where: 1) there are distinct harms; or 2) there is a reasonable basis for determining the contribution of each cause to a single harm. Assuming *arguendo* there is some harm attributable to Leasehold operations, it is clearly distinct and reasonably capable of being apportioned, as it is required to be by the *Alcan* court. While the alleged tortfeasor, Praxair here, carries the burden of establishing that the damages are capable of apportionment, Praxair has already met this burden. As the EPA's administrative record justifying placement of the Site on the NPL demonstrates, no harm has been attributed to Leasehold activities. To the extent that Praxair's response to EPA's information request identified prior Leasehold contamination, such contamination has already been cleaned up (as demonstrated by the NJDEPE records and attachments to this letter and Praxair's May 5, 1998 response to EPA's information request), the Leasehold has been capped by Praxair, and approval obtained by the state of New Jersey. In any event, with respect to contamination, if any, that EPA may reliably assert arose from Leasehold activities, none of it was transferred off the Leasehold to other parts of the Site, and EPA has no basis for reasonably alleging that environmental conditions on the former Leasehold require any response action under CERCLA.

We recognize, as the *Alcan* court noted, that at the typical Superfund site, e.g., a landfill where waste from dozens of generators has been mixed, determination of divisibility may require an "intensely factual" analysis. However, unlike the facts of that case, there was no commingling of wastes from the Leasehold with wastes on the other 24 acres at the Site; indeed, there were discrete and entirely separate business activities with no use by UCC, Linde, Praxair, or LCCD of other portions of the Site. Unlike Alcan at the Butler Tunnel Site, moreover, Praxair has expended hundreds of thousands of dollars to clean up the Leasehold. Prior to being determined liable and compelled by an order to investigate property already subject to extensive investigation and remediation, Praxair should be provided evidence of its contamination which requires response action under CERCLA.

As the Court held, "Alcan should be permitted this opportunity to limit or avoid liability. If Alcan succeeds in the endeavor, it should only be liable for that portion of the harm fairly attributable to it." *U.S. v. Alcan Aluminum Corp.*, 964 F.2d at 269. If the EPA were to issue a unilateral administrative order to Praxair, the Agency would contravene the mandate of the Third Circuit. Prior to having rebutted Praxair's and the state's conclusion, abundantly supported, that no further response action is needed arising from Leasehold activities, the Agency would have determined Praxair's liability under CERCLA. The *Alcan* court, in its analysis of causation, specifically rejected this approach. It injected causation into the equation. The Agency cannot and should not, by simply reciting the CERCLA "operator" mantra, order Praxair to investigate - or remediate - contamination on any part of the Site without relevant evidence that Leasehold activities have contributed or will contribute to CERCLA response costs. *Id.* at 270. See also *United States v. Township of Brighton*, 153 F. 3d 307, 318 ("[N]o causation means no liability, despite § 9607(a)'s strict liability scheme."); *United States v. Alcan Aluminum Corp.*, 990 F. 2d 711, 722 (2d Circ. 1993); *In re Bell Petroleum*

Services, Inc., 3 F. 3d 889, 901 (5th Cir. 1993) (“with respect to the timing of the “divisibility” inquiry, we believe that an early resolution is preferable.”)

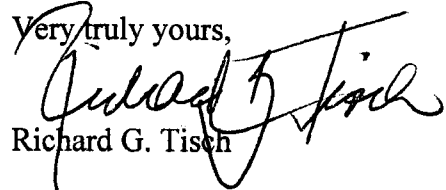
EPA should order those persons responsible for the actual unremediated hazardous substances releases, and the threat of future releases, at the Site to investigate whether any additional cleanup at the Site is required. Then, if potential response costs can be attributed to Leasehold activities, EPA may fairly and properly consider whether to order Praxair to engage in additional response actions.

Even if apportionment were a challenging task (although we believe the Site presents little difficulty for the EPA in isolating Leasehold “harm”, if any), the Courts have required the EPA to engage in this apportionment. (“The fact that apportionment may be difficult, because each defendant’s exact contribution to the harm cannot be proved to an absolute certainty, or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability.”) *Id.* at 903.

The EPA has undertaken no investigation regarding environmental conditions at the Leasehold portion of the Site. The information it possesses regarding such conditions was developed by UCC and Praxair and sets forth extensively the investigation and remediation, over a period of at least seven years, completed at the Leasehold. The NJDEPE has approved the cleanup. The Leasehold has been entirely paved, and no contamination there is known to exist requiring any response actions under CERCLA. But for the overly broad “facility” or Site designation under CERCLA by EPA, -- a designation apparently based upon the convenience of property ownership and not the reality of environmental contamination -- the Leasehold would not have been part of the Site.

The known Site contamination, which caused the property to be placed on the National Priorities List, was created by GAF and LCP. The historic metals-contaminated fill was placed by GAF over the entire Site down to a level of 4-5 feet and prior to UCC's operations. The NJDEPE records confirm that GAF was responsible for this fill. Its successor, ISP Environmental, and LCP bear the liability for investigation and remediation of the Site since they are the companies (or, as the case may be, a successor to the company) responsible for owning and operating the Site and disposing the hazardous substances triggering response costs. Neither UCC, Linde, Praxair, nor LCCD is one of these companies, and Praxair should not, as the Courts have held, be ordered to perform response actions for harm unattributed to it.

Therefore, Praxair respectfully requests that the EPA not issue a unilateral administrative order to Praxair requiring it to perform any response activities with respect to the Site. Should you or Patricia Simmons have any questions with respect to this submission, please call me.

Very truly yours,

Richard G. Tisch

RGT/jm
Enclosures

cc: Patricia Simmons, EPA